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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/737,128	12/15/2003	Michael John Rutter	CHM-010	5727
38155	7590	05/17/2005	EXAMINER	
HASSE GUTTAG & NESBITT LLC 7550 CENTRAL PARK BLVD., MASON, OH 45040			PATEL, NIHIR B	
			ART UNIT	PAPER NUMBER

3743

DATE MAILED: 05/17/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/737,128

Applicant(s)

RUTTER, MICHAEL JOHN

Examiner

Nihir Patel

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on March 6<sup>th</sup>, 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☐ Claim(s) \_\_\_\_\_ is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

## DETAILED ACTION

### *Response to Arguments*

Applicant's arguments filed on March 6<sup>th</sup>, 2005 have been fully considered but they are not persuasive.

**Referring to claims 1, 3-11, 15 and 17**, the applicant argues that the end tube section 2 disclosed by Beck is not short but rather elongated and second proximal tube section 12 disclosed by Beck is not elongated, but short. The examiner disagrees. Even though the applicant claims a short distal section and an elongated proximal section, the applicant fails to describe how short/elongated or short/elongated to what and therefore are considered broad terms in which the Beck reference reads on. In conclusion claims **1, 3-11, 15 and 17** are still rejected under 35 USC 102(b) as being anticipated by Beck (US 5,339,809) as stated in the previous office action dating back to November 30<sup>th</sup>, 2004.

**Referring to amended claims 2, 12, 18, 19, 20, 23, 24 and 25**, the applicant argues that Nye teaches away from a flexible tube that is entirely made of a thermoplastic material performed to the shape described. The examiner disagrees. In the summary of invention, Nye clearly states that **at least one** portion be made of flexible material not ruling out that the whole tube be made of flexible material. Therefore it would have been obvious to modify Beck's invention by providing an endotracheal tube that has all sections and bends that are made of thermoplastic material preformed to the shape desired in order to have better access to the patient's throat. In conclusion claims **2, 12, 18, 19, 20, 23,24 and 25** still rejected under 35 USC 103(a) as being unpatentable over Beck, Jr. et al.(US 5,339,809) in view of Nye (US 5,590,647).

**Referring to claims 13, 14, 16, 21 and 22**, in response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., tracheostomy) are not recited in the rejected claim(s) instead endotracheal tube are recited. Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). In conclusion claims **13, 14, 16, 21 and 22** are still rejected under 35 USC 103(a) as being unpatentable over Beck (US 5,339,809) in view of Joseph (US 5,582,167) as stated in the previous office action dating back to November 30<sup>th</sup>, 2004.

**Referring to claims 23 and 26**, the examiner still believes that the ratio between the length of the distal section to the length of the intermediate section and the ration between the length of the proximal section to the length of the distal section are simple matter of design choice since the applicant has not established any criticality in he specification on the ratios. The functional importance relating to the anatomy of the average patient, adult, child, male or female requiring a tracheotomy is more of a design choice than criticality and therefore claims **23 and 46** are still considered a simply matter of design choice.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

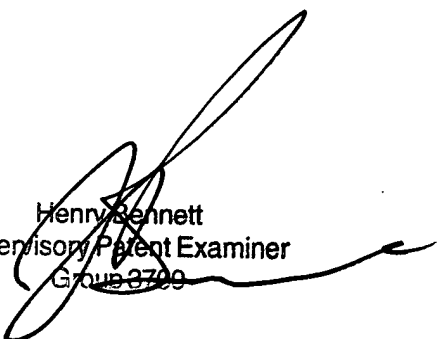
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after

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the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communication from the examiner should be directed to Nihir Patel whose telephone number is (571) 272-4803. The examiner can normally be reached on Monday-Friday from 7:30 am to 4:30 pm. If attempts to reach the examiner by telephone are unsuccessful the examiner supervisor Henry Bennett can be reached at (571) 272 4791.

NP  
May 9<sup>th</sup>, 2005

  
Henry Bennett  
Supervisory Patent Examiner  
Group 3700